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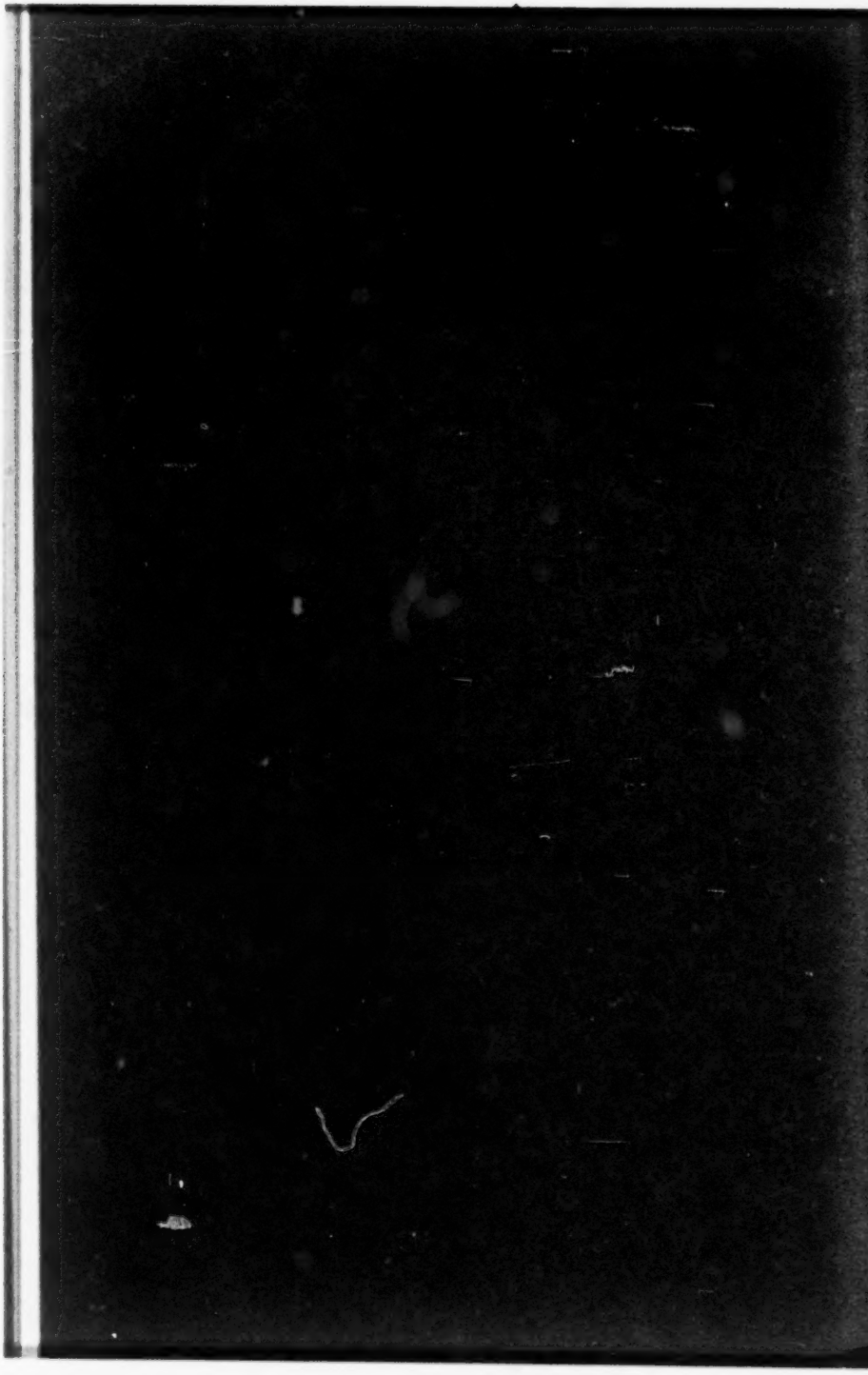

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 596

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS ON MOTION TO DISMISS.

The Solicitor General bases his motion to dismiss the appeal from the judgment of the Court of Claims on the sole ground that the only method provided by law for reviewing the judgment of the lower court is by writ of certiorari.

ARGUMENT.

The position of the Solicitor General amounts to this: That since a petition for certiorari to the Court of Claims had been filed in and then denied by this Court, the plaintiffs are without remedy, regardless of the fact that there has been no hearing nor decision of the case upon its merits, and regardless also of the fact that the Act of Congress of March 4, 1927, expressly gives the plaintiffs one year from and after the date of the approval of the act in which to *appeal* "from any or all orders, judgments, or decrees rendered against them in the trial of said action heretofore had."

In the first place, the quotation from the brief in support of the petition for certiorari (page 3, respondent's brief) does not indicate a belief on the part of appellants that, under the statutes and rules governing, certiorari is the only method of obtaining a review in the Supreme Court. Further, we doubt the construction given Section 3 of the Act of February 13, 1925, by respondent, even as to provisions for appeals contained in jurisdictional acts passed *prior* to said Act of February, 1925. Said Section 3 certainly does not in terms abolish the right of appeal, nor does it in terms repeal the provisions of all or of any act which gives the right of appeal from the Court of Claims to the Supreme Court.

Subdivision (*b*) of said Section 3 makes it "competent" in any case in the Court of Claims "for the Supreme Court upon the petition of either party,

whether Government or claimant, to require, by certiorari, that the cause * * * be certified to it for review and determination with the same power and authority and with like effect as if the cause had been brought there by appeal."

Surely, to make it "competent" for the Supreme Court to require by certiorari that the cause be certified to it, does not make certiorari the sole and exclusive method of procedure, nor mandatory upon the parties that they proceed by that method or not at all.

So far as the language of subdivision (*b*) of Section 3 is concerned the remedies by appeal and by certiorari are concurrent and the latter is not exclusive of the former.

And, if under subdivision (*b*) they are concurrent, then subdivision (*c*), making "All judgments and decrees of the Court of Claims subject to review by the Supreme Court as provided in 'this section' and not otherwise, does not by implication repeal prior statutes giving the right of appeal."

It is like the case of a statute giving a new remedy, but which under the authorities does not, without express repeal, take away a remedy previously existing.

Sutherland Stat. Con., 2d Ed., Sec. 260

> "If by fair and reasonable interpretation acts which are seemingly incompatible and contradictory may be enforced and made to operate in harmony and without absurdity both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment."
>
> Ibid., Sec. 267, p. 511.

But the question we are here dealing with is not whether Section 3 of the Act of February 13, 1925, repeals any *prior* act or acts allowing appeals from the Court of Claims, but whether appeal is a proper method of procedure under the later Act of March 4, 1927, expressly giving the right of appeal in *this particular case*.

Counsel for respondent cite six different jurisdictional acts, all relating to Indian claims and passed subsequent to the Act of February 13, 1925, in which the right of appeal from the Court of Claims is expressly given to either party.

From the language of these acts, counsel deduce the proposition that Congress through "force of habit" has continued to use the expression, "with right of appeal to the Supreme Court as in other cases."

If so, it seems to be a thoroughly seasoned habit.

It will be noted, however, that in the last three cases cited by counsel the phrase "as in other cases" is omitted, and the right of appeal is given without reference to "other cases."

Likewise, in the case at bar "other cases" are not mentioned, and the right of appeal is absolute for a period of one year from the date of the approval of the act.

It would seem conclusive from this often reiterated right of appeal that whatever Congress may have intended in regard to other cases cognizable in the Court of Claims, it intended just what it said in this class of special jurisdictional acts, namely, to grant the right of appeal.

Section 145, Judicial Code, prescribes what may be termed the general and continuous jurisdiction of the Court of Claims. For the various subjects therein enumerated, no special or additional legislation conferring jurisdiction on that court is necessary.

In passing the Act of February 13, 1925, Congress could well have had in mind the general law in regard to the jurisdiction of the Court of Claims, and the numerous cases for which that law provided, without at the same time considering what, if any, cases would arise for the adjudication of which special jurisdictional acts would be required. But in passing subsequent jurisdictional acts granting the right of appeal from the Court of Claims the presumption is that Congress knew of the Act of February, 1925, and of the provisions of Section 3 thereof, and with that knowledge acted deliberately when it in terms gave the right of appeal in such subsequent acts.

It will take more than an assertion that Congress acted through mere "force of habit" to overcome that presumption.

Moreover, it would appear from the nature and frequency of these Indian Claim cases, as well as from the ordinary situation and circumstances of the claimants themselves, that Congress intended the usual and general right of appeal should be preserved to them. The Act of March 4, 1927, being remedial in nature, is, under the general rule, to be liberally construed to effect the purpose intended by Congress. Such purpose would be defeated under the construction contended for by respondent.

One further consideration affecting this particular case and of which counsel for respondent makes some mention:

Not only does the Act of February 13, 1925, limit the time for filing petitions for certiorari to three months, but Section 243 of the Judicial Code limits the time of appeal to ninety days from the rendition of the judgment. It is presumed that Congress knew the law limiting the time in both forms of procedure, and then deliberately in derogation of that law made of this a special case giving *an entire year* from the approval of the act in which to appeal. This action of Congress fixing this particular time limit would seem to dispose of the contention that Congress meant otherwise than what it plainly said, and to make the right of appeal by appellants free from all doubt.

Respectfully submitted,

THOMAS STERLING,
Attorney for Appellants.

ROBERT T. TEDROW and
WALTER W. McCASLIN,
Of Counsel.

Office Supreme Court, U.
FILED
MAR 5, 1928
CHARLES ELMORE CROP
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 596.

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BRIEF FOR APPELLANTS.

THOMAS STERLING,
Counsel for Appellants.

ROBERT T. TEDROW,
WALTER W. McCASLIN,
Of Counsel.

(33,048)

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vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

Opinion of the Court Below.

The opinion of the Court of Claims is reported in Vol. 58, Court of Claims Reports, page 302.

Jurisdiction.

The case is now pending in this Court on appeal from the judgment of the Court of Claims rendered April 23, 1923 (R., 63, 64). The specific claims here advanced on behalf of appellants arise out of the findings of fact of the Court of Claims numbered respectively, V, VII, VIII and XI (R., 34-35, 36-38, 39, 41-43) and the conclusions of law therefrom (R., 50).

The case was numbered 33,731 in the Court of Claims, appellants having on December 24, 1923, filed an application for appeal to this Court, the Court of Claims on January 14, 1924, denied said application for the reason that the same was not filed within the time prescribed by Section 243 of the Judicial Code (R., 64). This appeal is taken under authority of the Act of Congress approved March 4, 1927, as follows:

Be it enacted, etc., "That the plaintiffs or complainants in suit numbered 33,371 in the Court of Claims of the United States be, and they are hereby granted one year within which to appeal from any or all orders, judgments or decrees rendered against them in the trial of said action heretofore had; Provided that the time within which said appeal may be taken shall begin to run with the date of the approval of this Act." Vol. 44, Part 3, p. 1847, Private and Concurrent Resolutions, etc. On June 6, 1927, on application of present counsel the Court of Claims made its order allowing such appeal (R., 65).

Statement of the Case.

The suit was brought in the Court of Claims to recover on ten several items or claims against the United States arising out of or involving various treaties or agreements between the United States and appellants and acts of Congress in relation thereto (R., 4-30).

The Court of Claims made its findings of fact as to all the claims and as conclusion of law found that appellants were not entitled to recover on any of such claims and rendered judgment accordingly (R., 30-50).

The specific claims here asserted arise out of the treaty of June 19, 1858, between the appellants and the United States, 12 Stat., 1031, 1037, under which appellants claim they are justly entitled to recover the sum of $541,120, being the difference between the price or value of 569,600 acres of their Minnesota River Reservation lands at $1.25 per acre and 30 cents per acre or $170,880, the price received (Finding V; R., 34-35).

(2) The claim that under the Act of March 3, 1863, 12 Stat., 819, appellants received none of the benefits assured them by the terms of said act and that they are entitled to recover the value of 322,080 acres of land instead of 361,920 acres, as claimed in the amended petition, at $1.25 per acre, or the sum of $402,600 (R., 4-8). Findings of fact 7, 9 (R., 36-38, 39).

(3) The claim that under the Treaty of September 20, 1872, Kapler's Ind. Laws and Treaties Vol. II,

1057, appellants should recover the sum of $300,000 or at the rate of ten cents per acre for 3,000,000 acres of land ceded under the erroneous estimate and belief on the part of the United States and appellants that 8,000,000 acres only were ceded whereas the actual acreage ceded was 11,000,000. That appellants were paid $800,000 or at the rate of ten cents per acre for 8,000,000 acres but have not been paid for the 3,000,000 acres in excess of said estimate (R., 8 11). Finding XI (R., 41 3).

(4) The claim that under the Treaty of July 23, 1851, 1 Stat., 949, a trust fund of $1,360,000 was created for the benefit of appellants out of the proceeds of the cession by appellants of all their lands in the then Territory of Minnesota and State of Iowa to the United States; that interest only at the rate of 5% per annum was paid on said fund for a period of fifty years and that no part of the principal of said sum has ever been paid, and that under the terms of said treaty and the conditions under which made appellants are justly entitled to recover the principal of said trust fund, amounting to $1,360,000 (R., 16 18). Finding VIII (R., 38).

Specification of Errors

The errors intended to be urged are as follows:

(1) The Court of Claims having made, among others, its findings of fact No. V, involving said treaty of June 19, 1858, erred in not holding there was a mistake on the part of the appellants and a mutual mistake be-

tween the parties to said treaty as to the value of the lands ceeded thereby, and erred in holding that appellants were not entitled to recover the difference between the value of said lands at 30 cents per acre and $1.25 per acre.

(2) The court having, among others, made its findings of fact No. VII, involving the provisions of the act of March 3, 1863, erred in not holding that appellants had not received the benefits assured them by said act, and erred in holding that they were not entitled to recover the value of the lands assured them at the rate of $1.25 per acre.

(3) The court having, among others, made its findings of fact No. XI, involving the treaty of September 20, 1872, erred in not definitely holding that there was a mutual mistake of fact as to the quantity of land ceded by said treaty and erred in holding that there was no satisfactory evidence of the value of the land ceded in excess of the estimate of 8,000,000 acres and in denying the right of appellants to recover for such excess at the rate of ten cents per acre.

(4) The court having, among others, made its finding VIII, involving the treaty of July 23, 1851, erred in not holding that appellants were at the time of such treaty mistaken as to their rights under existing law (Rev. Stat., Sec. 2079), and in denying the right of the appellants to recover the principal of the trust fund created by the terms of said treaty.

(5) The court erred in denying to appellants any relief whatever under their said several claims and in dismissing the petition of appellants and rendering judgment against them.

ARGUMENT.

There were in this case ten different items or causes of action, for each of which recovery was sought in the amended petition and in the hearing before the Court of Claims.

Complaint is here made that the court erred in denying the right of the plaintiffs to recover in the four particulars mentioned in their specification of errors herein. The Jurisdictional Act of April 11, 1916, 39 Stat., 47, giving the right to these petitioners, plaintiffs, to sue in the Court of Claims is a remedial act, its object being to give opportunity for the redress of certain alleged grievances. It is presumed that in the enactment of the statute Congress did not intend it as a mere gesture towards giving relief either legal or equitable. The act should therefore be liberally construed to effect the real purpose intended.

> Sutherland on Statutory Construction, Sec. 670;
> Beley vs. Napthaly, 169 U. S., 353;
> United States vs. Old Settlers, 148 U. S., 427.

Judgment having gone against the plaintiffs and their time for appeal having expired, Congress passed the act approved March 4, 1927, giving the plaintiffs "one year within which to appeal from any or all orders, judgments or decrees rendered against them

in the trial of said action heretofore had;" the time within which the appeal may be taken to begin to run with the date of the approval of the act.

This action after such lapse of time would indicate a belief on the part of Congress that the plaintiffs have rights legal or equitable or both which through oversight or error on the part of the trial court were not properly adjudicated and that the plaintiffs should now have the benefit of a review of the record by this honorable Court.

I.

The Claim for Additional Compensation for Lands Ceded Under the Treaty of 1858.

Similar treaties were made June 19, 1858, 12 Stat. 1031, 1037, between the plaintiff bands and the United States and the Medawakanton and Wahpakoota bands and the United States relative to the lands of their Minnesota River reservations.

In pursuance of these treaties the Senate of the United States, by its resolution of June 27, 1860, 12 Stat. 1042, declared that said bands had a just and valid right and title to the whole of said reservations, respectively, and that they should be allowed 30 cents per acre for the portions thereof lying on the north side of the river. That portion of the reservation of these plaintiffs lying north of the river consisted of 569,600 acres. For this they were paid at the rate of 30 cents per acre, or a total of $170,880 (finding numbered V, Record, p. 41).

The court further finds that the value of this land on March 3, 1863, was $1.25 per acre (Record, p. 41).

Such then must have been its value or approximate value at the date of the Senate Resolution, June 27, 1860. Such we contend is the valuation authorized by the Jurisdictional Act under which this action was brought under the proviso: "That in determining the amount to be entered herein the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty-three." Under the Act of April 24, 1820, the minimum price at which the public lands could be offered for sale is $1.25 an acre. Revised Statutes, Section 2357.

Why should the Jurisdictional Act have fixed March 3, 1863, as the date for determining the value of lands for which compensation is now sought?

We can conceive of two reasons: First, in order to guard against exorbitant claims for compensation based on values obtaining after the lapse of many years of constantly increasing values largely due to the settlement and improvements made by the white man, it was deemed a wise policy to fix an early definite date beyond which claimants could not go in search of a basis for compensation in land values; second, in cases where the treaty of cession was made prior to March 3, 1863, *and just compensation for the lands ceded has been delayed for almost two generations*, there was some semblance of justice in allowing claim-

ants such enhancement in value as might have accrued between the date of the cession and March 3, 1863. In any such case the time could not have been long enough to have permitted any great increase in value.

Along with the findings in regard to the location of these Minnesota River reservation lands is coupled the question of judicial notice. The Court will take cognizance of the Minnesota River of the territory through which it flows, and that it is one of the best agricultural regions of the United States.

As to the scope of judicial notice and its application here, we cite:

Watts v. Lindsey, 2 Wheat. 158.
McNutt v. Tuttle, 19 Wall. 352.
People v. Truckee Lumber Co., 116 Cal. 397; 48 L. R. A. 581.
Rulings of the Land Vol. II, p. 1058 and p. 1063.

It must be apparent therefore from what the Court of Claims has found in regard to the value of these lands and from what the court knows of the generality, history, and natural resources of the country that the value of the lands ceded was greatly in excess of 50 cents per acre at the time of the passage and approval of the Sioux resolution.

Are the plaintiffs to be denied all relief on this item because the court of claims did not see fit to apply the March 3, 1863, standard of value, or did not determine the exact value at the time of the treaty of June 19, 1858, or at the time of the passage of the Sioux resolution two years later?

On its face the transaction seems to put the Government in the position of an unconscionable profiteer. It acquires at 30 cents per acre and can and does immediately dispose of at $1.25 per acre.

But assuming now that the Senate acted in good faith in allowing plaintiff lands 30 cents per acre for their Minnesota lands, there must have been at the date of the resolution a mistake on its part of a material fact—the fact of the true value of the lands not settled upon and improved. The best evidence of such mistake is that part of the resolution of June 27, 1860, just quoted. If the Senate of the United States with its superior knowledge and means of knowing was mistaken then *a fortiori* were the Indians with their inferior knowledge of the value of lands for agricultural purposes, with their lack of knowledge of immigration and of the increasing demand for farm lands, also mistaken. It will be borne in mind that this treaty was made in 1858 when these Indians were in a much more backward state and less able to understand their rights than now, after more or less of contact with the evolving influences of nearly three-quarters of a century.

Suppose however the mistake falls somewhat short of what the law recognizes as a mutual mistake, and that it is unilateral rather than mutual; then we have the rule that, "knowledge by one party that the other is under a mistake as to such a matter as would make the transaction voidable if the mistake were mutual, if accompanied by any circumstances deemed inequitable, and perhaps generally without more, will have the

is judicially known, the denial of the right of recovery is quite inconsistent with the doctrine laid down from time to time by this Court in regard to the rights and duties arising out of the relation of the Government to the Indians.

The well recognized relation is that of a superior to an inferior, the latter being placed under the care and protection of the former.

Ex Hoff, 197 U. S., 488, cited in Hollister v. U. S., 76 C. C. A., 340, 145 Fed., 776.

The Indian nations have been denominated domestic dependent nations, their relation to the United States resembling that of a ward to his guardian.

Cherokee Nation v. Georgia, 5 Pet., 1, 8 L. Ed., 25.

Roff v. Burney, 168 U. S., 221, 42 L. Ed., 443.

The relationship being that of superior and inferior or like that of guardian and ward out of which arises the special duty of care and protection, the dealings of the Government with the Indians must be interpreted in the light of such relationship and such duty.

Choctaw Nation v. The United States, 119 U. S., 1.

The court in this case used the following language:

> "While the relation of superior and inferior which exists between the United States and the Indians whereby the latter are placed under the care and control of the former, authorizes the adoption on the part of the United States of

These considerations, induced by the relation of the parties and the duty arising therefrom, might well be relied on as grounds for the recovery of the principal of the balance claimed to be owing due those plaintiffs as a result of their transactions with the Government in the matter of, and under, the treaty of June 19, 1818.

Such common ratables with the authorities cited apply with equal force to items III and IV of plaintiffs' claim herein discussed.

The claim for interest as made in the Court of Claims is hereby waived and is recovery of the principal only is sought.

But the considerations above mentioned as reasons for granting relief in this behalf alone.

They are coupled with the proposition that in the valuation of the lands received there was a gain [illegible] a mutual mistake resulting in great loss to these plaintiffs. On both grounds they invoke the power and jurisdiction of this Court to correct the injustice done them.

The relief [illegible] on March 3, 1891 [illegible] by the Court of Claims, if the normal legislation as completed with the same [illegible] [illegible] [illegible] the Court's decision in the light of [illegible] to resolve the difference between the case just cited and the cases at bar, [illegible] contrary to the principles laid down in the cases cited and to the intent of the jurisdictional act.

II

The Claim for Compensation Arising Under the Act of March 3, 1863, 12 Stat. 819

On its face that act purported to be for the benefit of the four bands of Sioux Indians, namely, the Sisseton, Wahpeton, Medawakanton and Wahpekoota bands. Their grievances arose out of the cession of their lands in the State of Iowa and Territory of Minnesota under the treaties of July 23 and August 5, 1851, and were limited to the United States by the Act of February 16, 1861, 12 Stat. 172, in consequence of the Indian outbreak of 1862. The same act had also declared forfeited that part of the Minnesota reservation lands lying south of the Minnesota River.

[illegible] the Act of March 3, 1863, which provided that the President should cause said set apart for the four bands [illegible] of unoccupied lands to sale the United [illegible] State, without [illegible] allotting to each [illegible] are willing to [illegible] pursuit of agriculture [illegible] acres of good agricultural [illegible] same to be [illegible] adapted to agricultural purposes. It is [illegible] upon the face of the record that the [illegible] received the benefits of this act. The [illegible] of the plaintiff bands was [illegible] annuities that all the [illegible] Medawakanton and Wahpekoota bands. Thirteen hundred and six Indians were removed to Fort Snelling, where they had been held as prisoners, to the Crow Creek Reservation on the Missouri River,

set apart by the President under the Act of March 3, 1863. Of these 1,194 were evidently full-blood Medawakantons and Wahpakootas.

Therefore there could not have been to exceed 112 members of plaintiff bands who were at that time removed to Crow Creek Reservation. There is no evidence not failing to be either of the plaintiff bands were ever removed to Crow Creek, or were ever ordered to go there. See findings VI and VII, Record, pp. 41 to 44.

The fact and just conclusion is that the Government through the Secretary of the Interior and the Indian Office knew of the non-occupancy of the Crow Creek lands by the plaintiffs' bands or members of it and did not encourage such occupancy. The Government is therefore estopped from claiming that the plaintiffs shared in the benefits accruing from the Act of March 3, 1863.

Facts of which the court are bound to take notice and which cannot be controverted are treated as admitted for the Government's purposes. Thus, in the Sioux Treaties [illegible] the court will take notice of the Crow Creek reservation on the Missouri River in South Dakota. It will take notice of the fertile character of the soil and region where the reservation is and the fact that the successful growing of crops

We call attention to the fact of the enactment, over the collateral or [illegible] homestead and small [illegible] many of the Western [illegible] States, South Dakota included, and to the fact that [illegible] homestead acts, both made reasonably necessary

because the lands to which they applied were in those regions where the usual homestead of 160 acres was not sufficient to yield support for a family.

Act of March 4, 1909 (35 Stat., 1021).

Act of December 29, 1916 (39 Stat., 862).

Of this character or approaching it were the Crow Creek lands.

Another reason was the limited area of the Crow Creek Reservation and the doubt which must have been felt by the Secretary of the Interior and the Indian Office as to whether it could furnish to each member of the four bands who was willing to adopt the pursuit of agriculture even so limited a tract as "eighty acres of good agricultural lands." There were in the Crow Creek Reservation as finally set apart 275 840.93 acres according to the official plats of public land surveys in the General Land Office. For description of lands so Act of March 2, 1889, 25 Stat., 888, Section 6.

The record fails to show that any lands were ever set apart to the plaintiffs in lieu of the lands of which they were assured under the Act of March 2, 1889.

The lands included in the Lake Traverse and Devils Lake reservations under the treaty of February 19, 1867, 15 Stat., 505, as well as the neighboring lands ceded under the treaty of September 20, 1872 (hereinafter referred to), were already Indian country occupied by plaintiff bands. The two reservations were simply carved out of lands recognized as lands the right to the occupancy of which was in the plaintiffs

This is in effect the finding of the Commission appointed by the Secretary of the Interior under the Act of June 7, 1872, 17 Stat., 281.

Any benefits derived from the treaty of February 19, 1867, were not in consideration of the non-occupancy of the Crow Creek Reservation by the plaintiffs, but upon the express (and different) considerations set forth in Finding X of the Court of Claims, R., pp. 45-47, namely, in consideration of the cession by the plaintiffs of the "right to construct wagon roads, railroads, mail stations, telegraph lines and other public improvements over and across the lands claimed by said bands." And upon the further consideration of the faithful and important services said to have been rendered by the friendly bands of Sisseton and Wahpeton Sioux in the making of said treaty, and also in consideration of the confiscation of all their annuities, reservations and improvements."

The Act of March 3, 1863, was subsequent to the Forfeiture Act of February 16, 1863, 12 Stat. 652, but the forfeiture act furnished no consideration for the later act. Nor was the treaty of February 19, 1867, meant or understood to be as compensation to the plaintiff bands for their failure to receive any benefits under the Act of March 3, 1863.

We have, then, this situation: First, the Act of March 3, 1863, from which the plaintiffs received no benefits. Second, the knowledge of and acquiescence of the Government in the non-occupancy by the plaintiffs of the Crow Creek Reservation. Third, failure on the part of the Government to set apart to the plaintiff

this is true with respect to the lands anywhere available for such disposition on March 3, 1863, and especially less true as we have seen with respect to the lands finally set apart.

But the most practicable way of determining what would be a "reasonable compensation" seems to be to multiply the number of Indians by the number of acres which might be assigned to each member willing to accept an agricultural location. It is probable that out of the whole, or each member of the tribe, could avail of a right to the desired allotment in agriculture, would find several acres to their suitable and well adapted for that purpose.

With these in mind the factors in the problem of compensation, the other might be determined. The Minnesota lands ceded by the plaintiffs were worth $1.25 an acre on March 3, 1863, according to the Court of Claims. The good agricultural lands "well adapted to agricultural purposes" assigned to them by the Act of that very date could not have been of less value.

The plaintiffs claim, moreover, that there is justly due and owing to them from the sum of $40,000 heretofore appropriated by the act before the Court of Claims for payment of Section 177, Revised Code, and the decision of the Court, no claim for interest is here made.

Assuming the correctness of the Court of Claims report on page 10, Record, that "in the face of the record it would not be unjustified in the inference that

the President was remiss in not setting apart 30,720 acres of land in 1865 for the Sissetons and Wahpetons when these Indians were fleeing from captors, etc.[3], complaint is not here made that the President was remiss. But Congress passed the Act of March 3, 1865, for the benefit of all four bands, and in pursuance of that Act and under executive authority, of course, 1,486 Indians had been removed to that reservation in May, 1867, in anticipation of the formal order of the President made later.

III

The Claim for Compensation for Lands Ceded but Not Paid for Under the Treaty of September 20, 1872

As to this item, it is plain that under the findings of the Court of Claims (Finding VI, Record, p. 6) there was a material mistake of fact as to the quantity of land sold and ceded under the treaty. (Kappler's Indian Laws and Treaties, Vol. 2, p. 895.)

The only question was as to value, assuming that the court were right in the value of said lands ceded at the time of the making of said agreement of the 20th of March, 1867, is not sufficiently shown by the evidence.

But the tract was not exceptionally large one, being located in both parties at the time of the treaty between [illegible] acres, but as recited in the treaty [illegible] acres, more or less, and the classes of which the agricultural purposes were of known fertility [illegible] was full discussion of the question at considerable length, some of the Indians who belonging there were [illegible]

3,000,000 acres insisted on $200,000 more than was finally agreed upon, while one of the Commissioners thought that $800,000 for the 3,000,000 acres was too much. We doubt if under the circumstances the plaintiffs are in a position to claim $1.25 per acre, or in fact any greater value than that agreed upon which was at the rate of ten cents per acre.

The case here is different from that involving the value of the Minnesota lands discussed under Item I because there, in finding the value to be $1.25 an acre on March 3, 1863, the court should have found that as the value, or what for the purposes of the case is the same thing, the approximate value on June 27, 1866, the date of the Senate resolution. The material mistake here was as to the quantity of land ceded, and the circumstances tend to negative the idea of a mistake as to the value per acre of the land.

The "satisfactory evidence" then on which to base a judgment in favor of the plaintiffs for the sum of $200,000 on this item of their claim is found in the agreement of the parties after full discussion, for the cession of the lands involved for a sum amounting to ten cents per acre.

We see no such situation as that depicted by the Court of Claims in the opinion (page 61, Record) in regard to the cession of the lands in Dakota outside the Lake Traverse and Devil's Lake reservations. It is respectfully submitted that there is here no "supplication," but the earnest assertion of a plain right, a right to the correction of a very material mistake as to the quantity of land ceded.

If paragraph 6 of Finding XI (Record, pp. 48-49) does not find that both the parties were mistaken as to area ceded by the treaty of September 20, 1872, then we do not know what language could be used to describe a mistake. We quote:

> "It was the understanding and belief of the parties thereto that the approximate area of the tract of land to be sold and ceded by the Indians under said agreement was 8,000,000 acres; whereas the actual area of said land was 11,000,000 acres, approximately 3,000,000 acres more than was believed to constitute its area."

We do not think it was ever claimed that there was misrepresentation as to the number of acres. If there was we waive such claim, but the claim that "both parties were in error as to the acreage of the cession" is not waived; it is founded on the finding of the Court of Claims.

But it is argued that this was a sale in gross without reference in the negotiations or in the consideration to any particular number of acres, or that at most, the estimate of 8,000,000 acres was made for the purpose of description and under such circumstances as to show that the parties intended to fix the sale and cession of that particular body or tract of land for 8,000,000 whatever it might be or however much its real area might fall short of or exceed the estimate.

While admitting that some sales of this character have been upheld, the circumstances so vary as to make difficult the fixing of any other rule than that which follows: "If the difference in the supposed area

and the real is great, and the court is satisfied that the price was in fact influenced by the supposed area, relief has been allowed."

Williston on Contracts, Sec. 1571.
Thomas v. Perry, 1 Pet. C. C., 49.
Mosker v. Lack (Calif.), 181 Pac., 813.
Gardiner v. Koenig (Ind.), 108 N. W., 814.
Nave v. Price (Ky.), 56 S. W., 882.
Newton v. Tolle (N. H.), 94 L. R. A., 769.
Straiss v. Norris, 78 N. J. Eq., 488.
Wardell v. Eccleston, 115 Va., 294.

In the case McMahon v. Terkhorn (Ind.), 116 N. E., 927, 929, the following classification in Harrison v. Talbot, 2 Dana, 268, is quoted with approval:

> "Sales in gross may be subdivided into various subordinate classifications. First, sales strictly and essentially by the tract without reference to the quantities or to the consideration to arise, estimated quantity or price, several, sales of like kind in which, though a supposed quantity is referred to in the contract, the reference was made only for the purpose of description and under such circumstances or in such a manner as to show that the parties intended to risk the contingency of quantity whatever it might be or how much soever it might exceed or fall short of that which was mentioned in the contract. Third, sales in which it is evident from extraneous circumstances of locality, value, price, time, and the conduct and conversation of the parties that they did not contemplate or intend to risk more

than the usual rate of excess or deficit in similar cases or than such as might be calculated on as within the range of ordinary contingency, fourth, sales where, though technically deemed and denominated sales in gross are in fact sales by the acre and so understood by the parties." (Italics ours.)

Can there be any question that the sale here involved falls within the third class if not the fourth?

It is plainly not a case where the parties intended to go so far outside the range of "ordinary contingency" as to risk an excess of 2,000,000 acres in a sale of what was estimated and believed by both to be 8,000,000 acres.

So the difference between the supposed area and the real area was very great, and it must be evident that the price was influenced by the supposed area.

But there are other circumstances as shown by the record.

First, in selling 8,000,000 acres for $8,000,000 it was natural and reasonable that the transaction should be referred to as one in which the plaintiff bands were getting ten cents an acre for their land.

Other sales had been by the acre, and the Senate had originally allowed them 10 cents an acre for their Minnesota Reservation lands under the treaty of July 23, 1851, and 30 cents an acre under the treaty of June 19, 1858. They were therefore familiar with estimates and sales by the acre.

Second, the time was nearly 12 years after the passage of the Senate resolution allowing them 30 cents

an acre for their lands north of the Minnesota River and they certainly would have considered that any less sum than 10 cents an acre for their Dakota lands after this lapse of time would have been unreasonable.

Third, the consideration was evidently the subject of much discussion as appears from the record; some of the Indians wanted $200,000 more for the 5,000,000 acres than was finally agreed upon. But they sold 11,000,000 acres, and instead of getting ten cents per acre, as they supposed, they have been compelled to take 7.3 11 cents per acre. So, here again is involved the element of inadequacy of consideration as bearing upon the understanding of the plaintiff Indians as to the quantity of land ceded and upon their right to relief. That some of the Indians wanted $200,000 more for the supposed 5,000,000 acres is sufficient to induce the court to believe that if the truth had been known, viz., that they were parting with the title to 11,000,000 acres instead of 5,000,000 acres, the sale would not have been made.

Strauss v. Norris, 78 N. J. Eq. *supra*.

If the difference between the real and the represented quantity be very great both parties act obviously under a mistake which it is the duty of a court of equity to correct.

Mosher v. Ladd, *supra*.

Where the parties contract for the payment of a gross sum for a tract or parcel of land upon an estimate of a given quantity the presumption is that the

quantity influences the price to be paid and that the agreement is not one of hazard.

Wardell v. Birdsong, *supra*.

These are some of the "extraneous circumstances" as well as some of the governing legal principles which point irresistibly to the conclusion that the plaintiff bands never for one moment intended to risk the sale of 11,000,000 acres of land for $500,000 upon an estimate and belief by both parties that there were only 5,000,000 acres; and, by the same token, to the conclusion that on this item they are entitled to relief.

And, pray "is they cannot have interest so as to make it more complete and equitable.

But the principles above laid down, in regard to sales alleged to be sales in gross, apply in cases where the parties stand on an equal footing as to knowledge or means of knowledge of value, price, quantity, etc. with how much greater force should they apply here where it is the superior against the inferior, the strong against the weak, the intelligent and cautious against ignorance and improvidence.

The Court of Claims in its opinion refers to the time that has elapsed since this treaty—"More than a half century", but the act under which this case is prosecuted provides: If any such question is submitted to said court it shall settle the rights both legal and equitable of said bands of Indians and the United States, notwithstanding lapse of time or Statute of Limitations.

IV.

Claim for Payment of the Principal of the Trust Fund Created Under the Treaty of July 23, 1851.

Referring again to the treaty of July 23, 1851, out of which arises this claim of the plaintiffs for the principal sum of $1,360,000, the net proceeds of the sale and cession by the plaintiffs to the United States of their lands situated in the State of Iowa and the then Territory of Minnesota:

The extent and value of this cession is of interest from the standpoint of what is just and equitable in transactions between the Government and the plaintiff bands.

The Iowa cession amounted to 2,676,326 acres.

The Minnesota cession to 20,790,747 acres; a total of 23,467,073 acres. (See State maps based on official public surveys, General Land Office). The lands ceded were in two of the richest agricultural States in the Union. Even at $1.25 per acre their value would be $29,333,841 at the time of the cession. But the amount paid for this vast domain of fertile lands was approximately seven cents an acre; it was insignificant compared with the value of the lands ceded.

Is it unreasonable or inequitable to ask that the Government be required to administer its trust according to well-settled principles of equity, and as we shall hope to show according to the law, directly applicable to this case?

lations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys or of any portion, at a lower rate of interest than five per centum per annum." (Italics ours.)

Rev. Stat., Sec. 2069.

The money was received under a treaty for the cession of lands.

The treaty contained a stipulation that the balance of the fund, $1,000,000, should "remain in trust with the United States and five per cent. interest thereon to be paid annually to said Indians for the period of fifty years."

The remaining clause, "which shall be in full payment of said balance, principal and interest" is in conflict with said section 2069 *supra*, for otherwise the language "most safe and beneficial for the fund" is without meaning. Congress could never have contemplated that the payment of interest on any fund arising from the cession of Indian lands and remaining in trust with the Government should operate as a discharge and payment of the principal obligation.

Be it remembered that the relationship here again is that of the superior to the inferior, of the stronger and weaker, and similar to that of guardian and ward.

Re Heff, 197 U. S., *supra*.

Roff v. Burney, 168 U. S., *supra*.

The conduct of the Government here is not different from that of the ordinary trustee, who uses the estate

of the beneficiary for his own personal profit. Manifestly the acquisition of the lands, the creation of a trust fund out of the purchase money to be repaid, by the payment of fifty equal annual installments of interest, were transactions which served to greatly enrich the trustee Government at the expense of its wards the beneficiaries of the trust. The rule that a trustee can make no profit out of his trust springs from his duty to protect the interests of the estate and not to permit his personal interest to in any wise conflict with his duty in that respect.

Magruder v. Drury et al., Trustees, 235 U. S. 106.

It is significant that in Finding VIII (Record, pp. 44-45) the Court of Claims say that as appeared from the evidence "some of the members of plaintiff bands did not understand at the time of making said treaty that the payment of interest on said trust fund for 50 years was to be in full payment of the principal thereof, but understood that at the end of said 50 years the principal was to be paid to said bands, but it does not appear that the provision of the treaty on this point was misunderstood by the chiefs and headmen who represented said bands in the making of the treaty."

Notwithstanding the latter part of the above finding, we can think of no case which makes a stronger appeal for the application of the equitable principles which govern all fiduciary and trust relations. In passing it is observed that the court does not find

affirmatively that the "chiefs and headmen" understood the treaty, but, negatively, only that "it does not appear that the provision of the treaty on this point was misunderstood by the chiefs and headmen. To this we are constrained to add: "Nor does it appear from the finding that the provision of the treaty on this point was understood by the chiefs and headmen."

The finding "from the evidence" is clear, however, that some of the members of the plaintiff bands did not understand that the payment of interest was to be in full payment of the trust fund, "but understood that at the end of said period the principal was to be paid to said bands."

But independently of what some of the members of plaintiff bands understood as to the payment of the principal at the end of the 50-year period, was there not on the part of all the members of such bands, if not on the part of the representatives of the Government, a misapprehension as to their existing legal rights and interests under the law, Section 2069 Rev. Stats., *supra*?

The Act of 1862 makes no limitation as to the time for which investments of funds arising from lands ceded shall be made, nor recognizes any other method of discharging the principal than by paying it.

But of such act and of their rights under it the plaintiff bands were in 1864 presumably ignorant. It may be doubted whether the representatives of the Government in making the treaty knew of its existence.

The maxim, "ignorance of the law is no excuse," has its qualifications. The mistake here is not like one in regard to a general statute or law, merely, but like a mistake as to a private right resulting from the law, as a right of ownership, for example, and "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake."

Williston on Contracts, Section 1580

We may go further. It is not necessary that there be a common or mutual mistake as to the "relative and respective rights" of the parties; but it is necessary that the inequitable conduct of one of the parties should be intentionally misleading, much less that it be actual fraud. It is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements or acts of the other party.

Pomeroy Eq. Juris. Sections 847-848

According to this authority, all or nearly all of the well-considered decisions in which relief has been granted are those in cases where the party fails to understand the legal scope and effect of the transaction entered into, but was ignorant of his own *intended* and *existing legal rights* and interests.

Ibid., Section 849

And, again, "Mistakes therefore of a person with respect to his own private legal rights may be properly regarded, as in great measure they really are, and may be dealt with as mistakes of fact." *Ibid.*

And even more pertinent

> "Where ignorance or misapprehension of the law, even without any positive, incorrect or misleading words or incidental acts, occurs in a transaction concerning the trust between two parties holding close relations of trust and confidence, injuriously affecting the one who reposes the confidence, equity will in general relieve the one who has been injured. The relations of the trustee and *cestui que* trust, guardian and ward and the like are examples."
>
> Pomeroy, Section 848

And such is this case; not only under the relationship of the parties generally as recognized by the courts, but by the very terms of the treaty of 1851, a trust fund was created of the proceeds of the cession of the Iowa and Minnesota lands to the United States. Many years ago this Court laid down a rule governing the interpretation of treaties with the Indians in the following language by Justice McLean:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words have been made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty they should be considered as used in the latter sense. How the words of the treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction."
>
> Worcester v. Georgia, 6 Pet. 515

This opinion was cited and relied on in the comparatively recent case, Delaware Indians vs. Cherokee Nation, 193 U. S., 127. The comment of the Court in the latter case upon the principle laid down by Justice McLean is, in view of the class of treaties with which we are dealing, both interesting and significant. It is:

> "But the learned justice was here dealing with a treaty made between the representatives of the United States and those of the Indians wherein the inequality of the contracting parties in civilization and knowledge of law and the use of language is obvious." (The italics are ours.)

In another case the court discussing the relative situation of the parties to a treaty between the Indians and the United States says: "The parties are not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws."

> Choctaw Nation vs. United States, 119 U. S., 1.
>
> And see Jones vs. Meehan, 175 U. S., 1, *supra*.

Some Authorities Examined

On behalf of the plaintiffs we contend that the claims of the plaintiffs here made and relied on are not in conflict with certain authorities cited by counsel for the Government in the trial of the case before the Court of Claims and by the court itself in its opinion

In the first place the facts are essentially different. Take the case Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

An action to enjoin the Secretary of the Interior from leasing oil lands for the benefit of the Nation under the Act of 1898 on the ground that under previous treaties and patents the Cherokee Nation had the exclusive right to the use, control, and occupancy of said lands, etc.

The court in denying the claim of the plaintiff refers to the decision in Stephens *vs.* Cherokee Nation, 174 U. S., 445, wherein is discussed the reports of the Dawes Commission of 1894-5 and the Senate Committee of 1894, on the condition of affairs among the Five Civilized Tribes. The Dawes report showed a condition "abhorrent to our institutions." The Senate Committee finds that the lands set apart by the Government were held in trust by the Tribes for all the people of those Tribes, that the trust had not been properly executed.

"What," asks the Senate Committee in its report, "is the duty of the Government of the United States with reference to this trust? While we have recognized these Tribes as dependent nations, *the Government has likewise recognized its guardianship over the Indians* and its *obligation to protect them in their property and personal rights*." (Italics ours.)

Referring to the failure of the Cherokee Nation to carry out the stipulations of the Treaty of 1846 by passing laws for the equal protection and security of

life, liberty and property, the Senate Committee declares that "there appears to be no redress for the Indian deprived of his rights unless the Government does interfere to administer such trust."

Report Senate Committee 377, May 7, 1894, 53d Congress, 2d session.

The Act of June 28, 1898, under which the controversy concerning the leasing of oil lands arose and out of which grew the case, Cherokee Nation vs. Hitchcock, *supra*, is entitled, "An Act for the Protection of the People of the Indian Territory and for other Purposes."

And in this case the court, by Chief Justice White, says:

> "There is no question involved in this case as to the taking of property, the authority which it is proposed to exercise by virtue of the Act of 1898 has relation merely to the control and development of tribal property which still remains subject to the administrative control of the Government * * * * The power to administer upon and guard the tribal property being political and administrative in its nature, the manner of its exercise is for the legislative branch and not for the courts."

And thus instead of being in conflict with any of the items of plaintiff's claim these two cases, Stephens v. Cherokee Nation and Cherokee Nation v. Hitchcock (*supra*), recognize the general principle that the Government is the ultimate trustee for the purpose of safe

guarding and protecting their property and personal rights.

The same principle is involved in Lone Wolf *v.* Hitchcock, 187 U. S., 553, wherein was brought in question the validity of an act of Congress. The act ignored the provisions of Article 12 of the Treaty of 1867 with the Kiowas and other bands, and provided that no treaty for the cession of any part of the reservation should be of any force or validity unless signed by at least three-fourths of all the adult male Indians occupying the same. This Court in rejecting the claim used the following language: "To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians and to deprive Congress in a possible emergency when the necessity might be urgent for a partition and disposal of the tribal lands of all power to act if the assent of the Indians could not be obtained."

Next is the case United States *v.* Old Settlers, 148 U. S., 427.

We think the considerations which governed the court in its opinion in that case are applicable to items I, II, and IV of plaintiffs' claim here. There was first the jurisdictional act under which the suit was brought in the court of claims, second, the Act of March 4, 1927, giving a year in which plaintiffs might bring the case to the court for review.

In the Old Settlers case Congress authorized plaintiffs to bring their action in the Court of Claims.

The act was passed February 25, 1889, 25 Stat., 694, its title being, "An act to authorize the court of claims to hear, determine and render final judgment upon the claim of the Old Settlers or Western Cherokee Indians."

The court in the course of its opinion used the following language: "But we think under all the circumstances disclosed here that Congress being convinced that a mistake had probably been made * * * and desirous, as being the stronger party to the controversy, that that superior justice which looks only to the substance of the right should be done in the premises, voluntarily waived any reliance upon the lapse of time or laches * * * determined to obtain a judicial interpretation of the treaties and laws bearing upon the subject and to be bound by judicial decision in respect to the conclusions flowing therefrom and arrived at upon equitable principles, and that the jurisdictional act passed in effectuation of such intention left it open to the courts to readjust the account notwithstanding the claim might have been theretofore settled. In other words, if the adjustment and settlement were found to have been upon an erroneous interpretation which led to an obvious mistake, then Congress designed that the mistake should be corrected."

The contention of the plaintiffs in each and all the claims herein presented is, we believe, in harmony with the principles and spirit of this excerpt from the opinion in the case of the Old Settlers.

In Conclusion.

The claims of these plaintiffs are not exaggerated. Three of the claims arise out of treaties under the terms of which, and at a trifling cost, the Government was enriched a hundred fold by the acquisition of a vast domain which it disposed of to settlers who in turn through their occupancy and use of the land added billions to the national wealth. But as a natural result of the policy of getting the most possible for the least possible the Indians were impoverished.

The opinion in the case of Jones vs. Meehan, 175 U. S., *supra*, very clearly points out the conditions under which treaties were usually made. But it should be considered also, that the Commissioners employed by the United States were without doubt ambitious to "bring home" a treaty which from the money point of view would be most favorable to their employer. If this be all, the negotiators of the three treaties here involved could certainly "point with pride" to their work. But unfortunately the sharp bargain does not often leave a friend in the party who has been overreached, and, who can say, but that a realization of what the plaintiff bands had been led to sacrifice under the treaties of 1851 and 1858, combined with other grievances, was 'brooded over' by them and led to the savage and destructive outbreak of August 1862, concerning which the opinion of the Court of Claims speaks in such condemnatory terms? It will be recalled that the Civil War was then on, that there were undoubtedly Southern sympathizers in the State of Min-

nesota, who, "taking advantage of these unfortunate circumstances and of the national troubles, worked upon the fears and hopes of the dissatisfied and restive Sioux to make them more and more uncomfortable and unreconciled to the state of things. * * * They (the sympathizers) carried the matter further than they thought to do, and so fanned a fire, wild and destructive, which they could not control or extinguish."

See article, Vol. IX, page 430, Minnesota Historical Society Collections.

But, regrettable as was the terrible outbreak of 1862, these plaintiff bands have not been removed from about the only reservation within their power to make. There were among them the loyal scouts and soldiers to whom, and not to the bands themselves, two payments aggregating $60,000.00 were made by the Government, and this was claimed against the appellee's trust fund provided for by the Act of July 23, 1851. The trust fund was of course for the benefit of the two bands.

In addition the sum of $122,399.12 was expended by the Government for damages growing out of the outbreak, and this too was charged against said trust fund, making a total of $182,399.12 these bands have had as a result of the Indian War of 1862.

The accounts [illegible] and finally settled [illegible] opinion and judgment of the court [illegible] Stanton and Wahpeton Bands of Sioux Indians [illegible] United States, 208 U. S. 501.

We respectfully submit that in each of the four items herein discussed the plaintiffs are lawfully and in equity and good conscience entitled to a reversal of the judgment of the court of claims and to the relief sought.

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